UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL FRANCO,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-11-P-H***
	)	
SELECTIVE INSURANCE COMPANY	***)***	
and NEW JERSEY MANUFACTURERS	***)***	
INSURANCE COMPANY,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTIONS OF PLAINTIFF AND DEFENDANT SELECTIVE INSURANCE COMPANY FOR SUMMARY JUDGMENT

Defendant Selective Insurance Company ("Selective") moves for summary judgment on the claims against it in this action brought by the plaintiff as assignee of the interests of one or more of Selective's insureds. The plaintiff moves for partial summary judgment on the issue of Selective's duty to defend and indemnify its insureds in an underlying action brought by the plaintiff against them in this court which has been settled. I recommend that the court grant Selective's motion as to George Riker but deny it otherwise and that the court grant the plaintiff's motion as to Count I.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.

56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 19. For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to

judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

II. Factual Background

The plaintiff filed an action in this court against Staffco, Inc., George Riker, and others, by complaint dated September 26, 1996 ("the underlying action"), which was assigned Docket Number 96-281-P-C. Complaint in Docket No. 96-281-P-H ("Complaint I"), Exh. A to Complaint in the instant action ("Complaint II") (Docket No. 1). Default was entered against Staffco, Inc., Stafford Glass Co., Inc., Staffco Greenhouse, Inc. and George Riker in the underlying action in October 1996. Letter dated October 29, 1996 to counsel of record from Christa K. Thurber, Exh. B to Complaint II. The complaint in the underlying action alleged, *inter alia*, that the plaintiff had been injured on July 15, 1994 during the course of his employment in Maine by Staffco, a term used in the complaint to refer to Stafford Glass Co., Inc. and Staffco Greenhouses, Inc. as well as Staffco, Inc. Complaint I, ¶¶ 2, 11-15.

Selective issued a policy of general liability insurance to Stafford Glass Co., Inc. covering the period from March 31, 1994 to March 31, 1995. Complaint II, ¶ 22; Answer of Selective Insurance Company (Docket No. 3), ¶ 22. Staffco Greenhouses, Inc. was an additional insured under this policy. Deposition of Evelyn Jorgensen, Exh. C to Plaintiff Franco's Response to Defendant Selective's Statement of Material Facts as to Which There is No Triable Issue, attached to Plaintiff Michael Franco's Cross-Motion for a Partial Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 18), at 20. The plaintiff and Riker were employees of Staffco Greenhouses, Inc. at the time of the plaintiff's injury. Answers of Defendant Staffco Greenhouses, Inc. to Plaintiff's Interrogatories ("Answers to Interrogatories"), Exh. 1 to [Selective's] Statement of Material Fact as to Which There

is No Triable Issue ("Selective's SMF") (Docket No. 16), at ¶¶ 7, 10, 16. The complaint in the underlying action alleges that the plaintiff did not receive any workers' compensation benefits despite filing a claim against Riker and the Staffco entities pursuant to Maine law. Complaint I, ¶¶ 19, 37-38, 45-46, 66.

Selective first received notice of the underlying action by letter dated December 19, 1996. Affidavit of Evelyn Jorgensen, attached to Selective's SMF, ¶ 3. On July 15, 1997 this court denied the motion of Staffco, Inc., Staffco Greenhouses, Inc. and Stafford Glass Co., Inc. to set aside the default. Memorandum Decision on Motion of Defendants Staffco, Inc., Staffco Greenhouses, Inc. and Stafford Glass Company to Set Aside Default, *Michael Franco v. Staffco, Inc., et al.*, Docket No. 96-281-P-H ("Memorandum Decision"), Exh. C to Complaint II. The plaintiff, Stafford Glass Co., Inc., Staffco Greenhouses, Inc. (identifying itself as "also known as Staffco, Inc.") and George Riker entered into a settlement agreement dated January 6, 1998 in the underlying action in which the parties agreed that a stipulated judgment in the amount of $500,000 would be entered for the plaintiff and the defendants assigned to the plaintiff "any and all rights, claims and causes of action they may have" against Selective. Settlement Agreement, Exh. D to Complaint II, at 1, 2. The instant action was filed on January 13, 1998. Docket No. 1.

III. Discussion

Selective argues that certain exclusions in the policy at issue apply to the claims brought by the plaintiff as assignee of the Staffco entities and Riker. In the alternative, it contends that the notice of the underlying action that it received was untimely under the policy provisions, thereby

excluding coverage. The plaintiff seeks summary judgment on Count I of the complaint in this action, which alleges that Selective breached a duty to defend and indemnify Stafford Glass Co., Inc., Staffco Greenhouses, Inc. and Riker in the underlying action, Complaint II ¶¶ 50-59, but only on the claim concerning Stafford Glass Co., Inc. Plaintiff's Motion at 5.[1]

A. Notice

The insurance policy at issue provides, in relevant part:

> **Duties in the Event of Occurrence, Claim or Suit.**
>
> **a.** You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. . . .
>
> **b**. If a claim is made or "suit" is brought against any insured, y o u must:
>
> > **(1)** Immediately record the specifics of the claim or "suit" and the date received; and
> >
> > **(2)** Notify us as soon as practicable.
> >
> > You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> **c**. You and any other involved insured must:
>
> > **(1)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit" . . . .

Commercial General Liability Policy, Exh. E to Complaint II, at 7.

[1] The plaintiff's motion also requests summary judgment on Count X of the complaint, Plaintiff's Motion at 5, but that count is asserted only against defendant New Jersey Manufacturers Insurance Company, Complaint II ¶¶ 122-28, and the plaintiff's motion can only be read to seek summary judgment on a claim or claims against defendant Selective.

Selective was not notified of the existence of the underlying action until after default had been entered. Under Maine law,[2] a defense of untimely notice presents an exception to the general rule that the insurer's duty to defend and its duty to indemnify may not be determined simultaneously by the courts. *American Policyholders' Ins. Co. v. Cumberland Cold Storage Co.*, 373 A.2d 247, 250 (Me. 1977); *see Sagendorf v. Selective Ins. Co. of N. Am.*, 679 A.2d 709, 715-18 (N. J. Super. Ct. App. Div. 1996) (deciding both issues simultaneously). Thus, it is appropriate to consider this affirmative defense before proceeding, if necessary, to consider Selective's arguments concerning its duties to defend and to indemnify the three defendants in the underlying action in light of the policy language.

In order to avoid liability as a result of a failure of notice, an insurer must show that the notice provision of the policy was breached and that the insurer was prejudiced by the insured's delay. *Lanzo v. State Farm Mut. Auto. Ins. Co.*, 524 A.2d 47, 50 (Me. 1987); *Sagendorf*, 679 A.2d at 715. The burden of proof is on the insurer to demonstrate prejudice. *Ouellette v. Maine Bonding & Cas. Co.*, 495 A.2d 1232, 1235 (Me. 1985); *Sagendorf*, 679 A.2d at 715. Selective asserts that its insureds failed to provide it with copies of the summons and complaint in the underlying action immediately upon receiving them and that they did not notify Selective of the plaintiff's claim as soon as practicable. It contends that these failures breached the notice provision of the policy. The

[2] Selective is not willing to concede that Maine law governs this dispute. It maintains that New Jersey law may apply. Selective Insurance Company's Motion for Summary Judgment ("Selective's Motion") (Docket No. 15) at 7-8. However, it then states that "the principles of law upon which Selective will rely in its argument on coverage in this motion are generally similar between the states, and under the law of either state, there is no coverage through the Selective policy." *Id*. at 8. I have reviewed the New Jersey case law cited by Selective and find it indistinguishable from Maine case law on the matters at issue here. However, in view of the fact that Selective does not seek a ruling on its position, I will cite to New Jersey authority whenever possible in addition to Maine case law.

plaintiff responds that the "as soon as practicable" language of the notice provision is ambiguous and must therefore be construed against Selective, and that it was objectively reasonable for the insureds to believe that notice had been given to Selective "since notice to one of their two insurers was received on October 29, 1996, following service on October 4, 1996." Plaintiff's Motion at 19. Since none of the facts upon which this argument relies are included in the statement of material fact submitted by the plaintiff, they cannot be considered by the court. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995). I therefore turn to the prejudice prong of the applicable legal standard.

Selective argues that it was prejudiced by the untimely notice because the entry of default prevented Stafford Glass Co., Inc. from establishing that it was not involved in the project on which the plaintiff was working at the time of the injury, so that it could not have had any liability to the plaintiff, thereby relieving Selective of any duty to indemnify Stafford Glass Co., Inc. This argument goes only to Selective's duty to indemnify, because its duty to defend any of its insureds in the underlying action is to be determined solely by a comparison of the allegations in the complaint with the policy language. *J.A.J., Inc. v. Aetna Cas. & Sur. Co.*, 529 A.2d 806, 808 (Me. 1987); *Grand Cove II Condominium Assoc., Inc. v. Ginsberg*, 676 A.2d 1123, 1130 (N. J. Super. Ct. App. Div. 1996). Because Selective has not shown any prejudice regarding its ability to establish the absence of a duty to defend its insureds in the underlying action, it is not entitled to summary judgment on this basis.

Selective also contends that, even if Stafford Glass Co., Inc. and Staffco Greenhouses, Inc. had been considered a single entity,[3] as the complaint in the underlying action asserts, Complaint I,

[3] Neither Selective nor the plaintiff provides any indication in the statements of material fact submitted in connection with the pending motions that Riker was an insured under the insurance (continued...)

¶ 2, it would not have been required to defend them because the complaint alleges an injury that is within the language of the policy exclusion for employees. This contention refers to the following section of the policy:

> **2. Exclusions**.
>
> This insurance does not apply to:
>
> **e**. "Bodily injury" to:
>
> **(1)** An employee of the insured arising out of and in the course of employment by the insured. . . .
>
> This exclusion applies:
>
> **(1)** Whether the insured may be liable as an employer or in any other capacity.

Comprehensive General Liability Policy at 1-2. The parties agree that the plaintiff was employed by Staffco Greenhouses, Inc. at the time of his injury and that the injury arose out of and in the course of that employment, although that issue was in dispute in the underlying action.

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[3](...continued)
policy at issue. Selective does argue that he had no legal liability to the plaintiff, but that argument is irrelevant if the policy did not provide him with coverage. The plaintiff argues that, if Riker was not a proper party to the underlying action, "all the more reason why Selective should have defended him against what it alleges was a baseless, untenable claim." Plaintiff's Motion at 9, n.6. Since the plaintiff does not present any evidence through his statement of material fact that Riker as an individual was insured under the policy, he cannot argue that Selective had any duty to defend him. In addition, the summary judgment record supports the conclusion that Riker was not an insured under the Selective policy. The insurance policy at issue provides that "[e]ach of the following is . . . an insured: **a**. Your employees, other than your executive officers . . . . However, no employee is an insured for: **(1)** "Bodily injury" . . . to you or to a co-employee while in the course of his or her employment . . . ." Comprehensive General Liability Policy at 5. Riker was president of Staffco Greenhouses, Inc., a named insured, Answers to Interrogatories ¶ 1, and thus an executive officer of an insured. He was also an employee of Staffco Greenhouses, Inc. on the project where the plaintiff was injured while in the course of his employment, *id*. ¶ 7, bringing him within another exclusion from insured status under the policy language. Selective therefore is entitled to summary judgment as to any claims asserted by the plaintiff by virtue of assignment from Riker.

The default, and the insureds' lack of good excuse for the default, Selective asserts, prejudiced Selective by making it liable for a loss that would clearly have been precluded by the policy language, absent the default. This argument erroneously focuses on the default rather than the lack of timely notice as the cause of prejudice. If Selective means to assert that it would have taken steps to insure that default did not occur, had it been notified about the underlying action before the default was entered, notwithstanding its contention that it had no duty to defend its insureds in that action, there is nothing in Selective's statement of material facts to support such an argument. Indeed, Selective's failure to take any steps in the underlying action in the seven months between the time it was notified and the date when this court denied its insureds' motion to set aside the default strongly suggests otherwise.[4] In any event, the issue of prejudice as presented by Selective requires only brief further discussion.

In *American Home Assur. Co. v. Ingeneri*, 479 A.2d 897 (Me. 1984), the insurer sought a declaratory judgment that it had no duty to defend or indemnify its insured on the ground of lack of notice. The insurer was notified of the underlying action three days after default was entered against its insured. *Id.* at 902. Default judgment was entered after hearing two months later. *Id.* The Law Court held that the insurer was not prejudiced by the insured's failure to give notice under the circumstances because it had ample opportunity to investigate the claim and protect its interests prior

[4] Selective states in its reply memorandum that it does not contend that it was prejudiced by the belated filing of the motion to set aside the default in the underlying action, but rather that "it may have been prejudiced by the defaulted parties' lack of good excuse in allowing the default to be entered." Selective Insurance Company's Reply Memorandum in Support of Motion for Summary Judgment ("Reply Memo") (Docket No. 20) at 13. Again, Selective fails to explain how it was prejudiced by the untimely notice. It should also be noted that the order denying the motion to set aside the default in the underlying action found that "the eight month delay in moving for relief from the default itself provides a sufficient basis to deny the motion." Memorandum Decision at 3. Selective was aware of the default for six of those eight months.

to the entry of the default judgment. *Id.* Here, Selective does not argue that it had no opportunity to protect its interests in the underlying action. In *Michaud v. Mutual Fire, Marine & Inland Ins. Co.*, 505 A.2d 786 (Me. 1986), the insurer was first notified eight months after default was entered in the underlying action and did not participate in the damages hearing another eight months later. *Id.* at 787. In the subsequent action by the plaintiff in the underlying action to reach and apply the proceeds of the defaulted defendant's policy, the Law Court held that the post-default notice to the insurer was adequate to satisfy the requirements of due process. *Id*. at 790. While prejudice to the insurer was not the specific issue addressed in *Michaud*, the holding that the post-default notice "constituted notice at a meaningful time," *id.* at 791, strongly suggests that the insurer was not prejudiced. Here, Selective chose to rely on its assertion that it had no duty to defend the Staffco entities and Riker rather than to attempt to have the default set aside in the underlying action.[5] *See also Costagliola v. Lawyers Title Ins. Corp*., 560 A.2d 1285, 1288 -89 (N. J. Sup. Ct. 1988) (no showing of appreciable harm from late notice when insured succeeds in underlying action). On the basis of the summary judgment record, Selective has not demonstrated that it was prejudiced by the delay in notification.

B. Duty to Defend

An insurer's duty to defend its insured is determined by comparing the provisions of the

[5]In its reply memorandum, Selective argues that it had no meaningful opportunity to have the default set aside at the time it received notice because it had been informed that the insureds had no good excuse for their failure to file a timely answer. Reply Memo at 12-13. This argument is based upon factual assertions that are not part of the summary judgment record and thus may not be considered by the court. In addition, the argument misconstrues this court's eventual order denying the motion to set aside the default that was eventually brought by the insureds without any involvement by Selective. *See* Memorandum Decision at 2-3.

insurance contract with the allegations in the complaint. "If there is *any* legal or factual basis that could be developed at trial, which would obligate the insurer to pay under the policy, the insured is entitled to a defense." *J.A.J., Inc.*, 529 A.2d at 808 (emphasis in original); *accord, Mt. Hope Inn v. Travelers Indem. Co.*, 384 A.2d 1159, 1162 (N. J. Super. 1978). Selective contends that the plaintiff maintained in the underlying action that he was employed by both Staffco Greenhouses, Inc. and Stafford Glass Co., Inc. at the time of his injury and that both defendants admitted in that action that they employed him. If that is the case, the policy exclusion applies, and Selective concludes that it had no duty to defend either of its insureds. Selective also argues that the default establishes that the plaintiff was employed by both, and that this effect of the default extends to actions other than that in which the default occurred. The third argument urged by Selective, without citation to authority, is that requiring it to pay for a loss that would not have arisen but for the wrongful conduct of its insureds, *to wit*, their failure to have workers' compensation insurance in place and their allowance of the entry of default against them, would violate public policy. Finally, Selective asserts that the plaintiff is barred from arguing in this action that Stafford Glass Co., Inc. did not employ him at the time of the injury by the doctrine of judicial estoppel, because that argument is "an absolute reversal" of the position he took in the underlying action. Reply Memo at 1. Selective's arguments address the duty to indemnify rather than the duty to defend, because they rely on events and information outside the allegations in the complaint in the underlying action.

The plaintiff, in his motion for partial summary judgment, argues that Selective had a duty to defend Stafford Glass Co., Inc. in the underlying action because the complaint asserted negligence counts and because the plaintiff could have been employed by only one of the insureds. Both arguments are presented in conclusory fashion, without citation to authority. The plaintiff addresses most of his effort to an argument that Selective had a duty to indemnify Stafford Glass Co., Inc.

Before reaching the issue of the duty to indemnify which preoccupies the parties, it is necessary to resolve the question whether there was a duty to defend either insured. *Penney v. Capitol City Transfer, Inc.*, 1998 ME 44 ¶ 5, 707 A.2d 387, 389 (Me. 1998).

A careful review of the complaint in the underlying action reveals that Selective's interpretation, that the complaint alleges that both insureds employed the plaintiff and that such an allegation requires a finding of no duty to defend based on the policy exclusion, is incorrect. The insured is entitled to a defense if the allegations in the complaint provide any legal or factual basis that could be developed at trial that would obligate the insurer to pay under the policy at issue. The complaint in the underlying action lists as a defendant in its caption "Staffco, Inc., n/k/a Stafford Glass Co., Inc., n/k/a Staffco Greenhouses, Inc." Complaint I at 1. The body of the complaint identifies one of the defendants as follows:

> Defendant Staffco, Inc., (hereinafter referred to as "Staffco"), n/k/a Stafford Glass Co., Inc., n/k/a Staffco Greenhouses, Inc., is a corporation operating under the laws of the State of New Jersey with a place of business in Midland Park, New Jersey.

Id. ¶ 2. The complaint goes on to allege that "Staffco hired employees in the State of Maine, including the Plaintiff," *id*. ¶ 9(ii), that "[o]n or around July 2, 1994, Plaintiff was employed by and began working for Staffco," *id.* ¶ 11, that the plaintiff was injured in the course of that employment on July 15, 1994, *id*. ¶¶ 14-15, that after the injury Staffco denied "the existence of the Plaintiff's employment with Staffco" and denied him workers' compensation coverage, *id*. ¶¶ 19-20, and that Staffco failed to provide workers' compensation insurance to cover the plaintiff's injury as required by Maine law, *id.* ¶ 66. Neither Stafford Glass Co., Inc. nor Staffco Greenhouses, Inc. is mentioned in the complaint other than in the caption and Paragraph 2, as set forth above.

Based on these allegations, it is possible that either Staffco, Inc., Stafford Glass Co., Inc. or

Staffco Greenhouses, Inc. employed the plaintiff and that all three, or two of the three, were in fact separate entities. If either Stafford Glass Co., Inc. or Staffco Greenhouses, Inc. employed the plaintiff and the other did not, the employee exclusion in the policy would not apply, and there might be coverage under the policy for the claims against the non-employer insured.[6] The fact that the complaint treats all three corporations as one for pleading purposes is not determinative. Selective argues that, in this event, the exclusion would still apply to the non-employer insured because it states that coverage is excluded "whether the insured may be liable as an employer or in any other capacity." Selective's Motion at 13. This argument ignores the initial language of the exclusion, which denies application of the insurance to bodily injury to "[a]n employee of the insured." Policy, Section I, Coverage A, Section 2(e)(1), at 1. The exclusion applies whether the insured is liable in its status as employer or in any other capacity, *id*. at 2, but only if the claimant is an employee of the insured in the first place.

In addition, the underlying complaint alleges that Staffco violated the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962, resulting in injury to the plaintiff and his business and property, Complaint I ¶¶ 33-35, intentionally and negligently inflicted emotional distress upon the plaintiff, *id*. ¶¶ 68 & 70, and committed fraud and misrepresentation, *id*. ¶¶ 61-64. The policy exclusion upon which Selective relies to disclaim a duty to defend excludes only claims for bodily injury, which is defined in the policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Policy, Section V(3), at 8. Some of the claims raised in these counts cannot be construed as claims for bodily injury, and therefore the exclusion is not applicable. Selective does not argue that any other exclusion applies. The policy also provides

[6] This would also be true of the policy exclusion for "[a]ny obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law," Policy, Section I, Coverage A, Section 2(d), at 1, upon which Selective also relies. An insured that did not employ the plaintiff would have no such obligation.

coverage for property damage. *Id.* Section I, Coverage A, Section 1, at 1. At a minimum, Selective has offered nothing to suggest that it did not have a duty to defend both of its insureds on the claim for property damage that is asserted in the complaint.

The existence of the RICO claim also renders Selective's argument based on the policy's exclusion for obligations under a workers' compensation law unavailing. Selective contends that the injury alleged in the complaint falls under workers' compensation law, and that the failure of its insureds to obtain workers' compensation coverage as required by 39-A M.R.S.A. § 401 relieves it of any duty to defend either insured by virtue of the language of the exclusion. Assuming without deciding that such a failure would fall within the policy exclusion, and further assuming that the exclusivity provisions of 39-A M.R.S.A. § 104, which exempts employers who obtain workers' compensation coverage from civil actions at common law or under certain specific Maine statutes, would also fall within the exclusion, thus excluding from coverage the common law tort claims asserted in the underlying complaint,[7] the RICO count, a federal statutory claim, would still remain. Selective does not suggest how this claim would be outside the possible coverage of its policy. Based on the summary judgment record, I can only conclude that Selective had a duty to defend its insureds in the underlying action. That duty was breached.

C. Duty to Indemnify

The plaintiff argues that Selective has a duty to indemnify Stafford Glass Co., Inc. for the settlement entered in the underlying action. The settlement agreement stipulates to the entry of a judgment against Stafford Glass Co., Inc., Staffco Greenhouses, Inc. and Riker, jointly and severally,

[7] I hasten to note that it is highly unlikely that the exclusion would operate in this manner.

in the amount of $500,000 on Counts II, IV, XI and XIII of the underlying complaint. Settlement Agreement, Exh. D to Complaint II. Those counts assert claims for negligence, negligent infliction of emotional distress, and punitive damages against "Staffco," which is defined by the complaint to include Stafford Glass Co., Inc. Complaint I, ¶¶ 2, 36-39, 68-72. The plaintiff bases its argument on two distinct legal theories: (i) Selective has waived its right to contest indemnification by virtue of its breach of its duty to defend its insureds, and (ii) the facts that Stafford Glass Co., Inc. did not employ the plaintiff and had no involvement in the project upon which he was working at the time he was injured mean that Selective has a duty to indemnify Stafford Glass Co., Inc. Of course, if Stafford Glass Co., Inc. had not failed to answer the complaint and otherwise acted in a manner that led to the default and the court's refusal to set aside the default, these facts would also mean that Stafford Glass Co., Inc. might have been able to establish at trial that it had no liability to the plaintiff.

Selective relies on the arguments recounted above to support its contention that it has no duty to indemnify either of its insureds under the circumstances of this case.

Because the waiver argument is potentially dispositive, I will address it first. This court held in *Anderson v. Virginia Sur. Co.*, 985 F. Supp. 182, 189 (D. Me. 1998), that, under Maine law, "a wrongful failure to defend an insured results in the insurer's waiver of the right to litigate the indemnification issue." The decision was based on *Cambridge Mut. Fire Ins. Co. v. Perry*, 692 A.2d 1388 (Me. 1997), and specifically notes that "the consequences of breaching the duty to defend can be harsh," including liability for a settlement when "there was in fact no duty to indemnify on the insurer's part." 985 F. Supp. at 189. "[A]n insurer who breaches the duty to defend cannot avoid liability for a settlement by claiming that it had no duty to indemnify its insured in the underlying action." *Id*. at 190; *see Griggs v. Bertram*, 443 A.2d 163, 174 (N. J. 1982) (settlement entered into by insured after insurer wrongfully refused coverage and defense may be enforced against insurer).

Selective attempts to distinguish *Perry* on the grounds that the only issue in that case was the insured's ability to settle her claim without the consent of the insurer, as required by the terms of the applicable policy, after the insurer had breached its duty to defend, and that the language of the opinion is limited to those instances in which the insured's claim is entitled to indemnification under the terms of the policy. While the Law Court's opinion in *Perry* does not appear to me to be so limited, the case is not on all fours with the instant case because the only issue addressed by the Law Court was the insurer's reliance on the insured's alleged breach of the insurance contract by entering into a settlement without its knowledge or consent. 692 A.2d at 1391. *Anderson* is more directly relevant to the situation presented here. Selective suggests that this court's reliance on *Perry* in *Anderson* was misplaced and that its holding "is in fact unauthorized by the clear language of that case," Reply Memo at 9 n.6. I disagree, *see* 985 F. Supp. at 1391 n.3 (suggesting factual circumstances under which coverage might not have been available under the policy at issue), but in any event I am not inclined to reject the holding in *Anderson* on this basis.

Selective also contends that *Anderson* does not support a finding that it waived its right to litigate indemnification in this case because Selective brought a declaratory judgment action concerning its duties to defend and indemnify its insureds in the underlying action, citing to *dicta* in the opinion's discussion of the argument that *Perry* was distinguishable because two insurers were involved in *Anderson*, rather than an individual claimant and an insurer. 985 F. Supp. at 191 (insurer's position "makes it possible, and even advantageous, for insurers to take their chances with a refusal rather than providing a defense or bringing a declaratory judgment action to determine whether a duty to defend exists"). This is far too slender a reed to bear the weight of the limitation of the clear holding of *Anderson* urged by Selective.

In *Anderson* the insurer was notified of the underlying action some seven months after it was

brought. *Id*. at 184. No default was ever entered. The insured was defended in that action by another insurer. *Id.* That insurer also filed a declaratory judgment action concerning its duty to defend and indemnify, and this court determined that it had a duty to defend the insured. *Id*. at 185. Virginia Surety, the second insurer, took no action at all until the insured filed an action against it, ten months after it had been notified of the underlying action, alleging breach of its duty to defend and indemnify him. *Id.* It was in this context that this court made the observation cited by Selective and also observed that "if an insurer, having wrongfully refused to provide a defense, is not liable for the costs of settlement simply because the insured is represented by a second insurer, then the second insurer has a strong disincentive to avoid settling the underlying dispute despite the possible prudence of such an action." *Id*. at 191. These observations provide no support for Selective's argument that, a default having been entered against its insured, it could take no action to seek to set aside the default but merely file a declaratory judgment action in a different court seven months after the entry of the default, Selective's Motion at 3, in order to avoid a finding that it has waived its right to litigate its duty to indemnify its insured, once its duty to defend has been established. Indeed, Selective's argument would contradict "Maine's strong policy of encouraging insurers to defend their insureds, even if other insurers are already involved, whenever the comparison tests is satisfied." *Anderson*, 985 F. Supp. at 190; *see Voorhees v. Preferred Mut. Ins. Co.*, 588 A.2d 417, 425 (N. J. Super. Ct. App. Div. 1991) (noting strong public policy requiring provision of defense where coverage at least arguable). *Anderson* is not distinguishable from the instant case on this basis.

Because application of *Anderson* leads to the conclusion that Selective has waived its right to contest its duty to indemnify its insureds under the circumstances of this case, it is not necessary to address Selective's arguments concerning that duty. The plaintiff is entitled to summary judgment

on this issue as well.

The plaintiff appropriately concedes that Selective retains the ability to contest the reasonableness of the settlement in the underlying action. An insurer's liability for payment of a settlement is dependent upon the requirement that the settlement be both "reasonable and in good faith." *Id*. at 191; *Perry*, 692 A.2d at 1391; *Jefferson Ins. Co. v. Health Care Ins. Exch*., 588 A.2d 1275, 1278 (N. J. Super. Ct. App. Div. 1991). The burden is on the insurer to prove that the settlement is unreasonable or in bad faith. *Perry*, 692 A.2d at 1391; *Griggs*, 443 A.2d at 173. Accordingly, because there has been no examination of the reasonableness of the settlement, the plaintiff is entitled to summary judgment on Count I only to the extent of Selective's liability. Either the plaintiff or Selective may seek resolution of the issues of reasonableness and good faith, or either issue, by appropriate means in further proceedings in this action.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of Selective Insurance Company for summary judgment be **GRANTED** as to George Riker, defendant in the underlying action and participant in the settlement of that action, and otherwise **DENIED**. I further recommend that the plaintiff's motion for partial summary judgment be **GRANTED** as to the liability of Selective Insurance Company on Count I, with damages to be determined, and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of May, 1998.

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David M. Cohen
United States Magistrate Judge